Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's Program Access Rules	)	
	)	

COMMENTS OF AMC NETWORKS, INC.

Tara M. Corvo
Mary C. Lovejoy
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

December 14, 2012

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 12-68
Revision of the Commission's Program Access Rules	)	

COMMENTS OF AMC NETWORKS, INC.

AMC Networks, Inc. ("AMC") submits these comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] The Commission should reject the proposals set forth in the *Further Notice* to modify the program access rules relating to buying groups. The changes proposed by the American Cable Association ("ACA") are unnecessary and counterproductive; they undermine the meaning and stated purpose of the existing rules; and they would harm competition across the video programming market.

INTRODUCTION AND SUMMARY

ACA proposes that the Commission change the program access rules related to buying groups to address a problem that does not exist, and in doing so threatens to alter the video programming marketplace in a way that will harm competition and unnecessarily expose cable-affiliated programmers to significant financial risks.

First, ACA's proposed changes eliminate the requirement that buying group guarantee the financial obligations of its members to video programmers. If such an entity were permitted to avail itself of the program access rules, it could effectively force a cable-affiliated programmer to provide content at rates favorable to the distributors without any guarantee of payment. The

---

1/ *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Further Notice of Proposed Rulemaking, FCC 12-123 (Oct. 5, 2012) ("*Further Notice*").

Commission has previously recognized the financial risk that buying groups create for cable-affiliated programmers – a risk that should not be dismissed lightly. If a buying group is unwilling to provide value to a programmer in the form of guaranteed payment and lower transaction costs, then it should not be permitted to force a programmer to do business with it under the program access rules. Indeed, it would be particularly inequitable to compel cable-affiliated programmers to deal with such an entity, while unaffiliated programmers would remain free to insist upon firmer financial guarantees as a condition of doing business.

In truth, there is simply no need to relax the definition of buying group to include an entity that acts merely as a forwarding agent between MVPDs and programmers. No buying group or MVPD is barred from availing itself of the program access rules. In proposing the rule change, ACA does not argue that would-be buying groups are in any way prevented from meeting the rule's existing standards for liability; rather, its proposal reflects merely that one particular entity – the National Cable Television Cooperative ("NCTC") – simply chooses to conduct business in a different manner. This reality does not warrant a drastic rule change that will have profound effects across the market.

Second, the Commission should not restrict a programmer's ability to enter into bilateral license agreements with key distributors by amending the FCC's rules to give MVPDs free rein to opt into a buying group's master agreement. Such a regime will eliminate incentives for even the largest MVPDs to negotiate on an individual basis and will cause significant disruption and harm to consumers. A government-guaranteed, automatic opt-in not only interferes with programmers' First Amendment rights, but with their ability to conduct business.

If any MVPD can force its way into a group agreement with a programmer, cable-affiliated programmers would no longer be able to negotiate reasonable individual agreements

with any MVPD. Even the largest MVPDs will seek to take advantage of and leverage the rates offered in a master agreement; to the extent programmers seek individual agreements, the group rates will simply end up being a starting point from which MVPDs will seek to strong-arm cable-affiliated programmers into a better deal, knowing that in the worst case scenario, they can simply opt-in to the group agreement to avoid losing access to the programming. Inevitably, this will lead to consolidation of market power among just a few large purchasing groups, meaning that in the event of a negotiating standoff between a programmer and a buying group whose members include a significant number of MVPDs in a given market, viewers will be left with little or no alternative means for obtaining valued programming.

Further, such an approach will lead to acute distortions in the programming marketplace. Cable-affiliated programmers will encounter all the risks and disadvantages associated with a near-monopsony marketplace, while unaffiliated programmers – who will remain free to constrain individual MVPDs from opting in – will continue to reap the benefits and advantages of a competitive market.

Third, ACA's proposal to alter the analysis of whether a complainant buying group is similarly situated to an individual MVPD to examine only the number of subscribers offered ignores the many and varied distinctions between entities that may warrant significant differences in the terms and conditions of an agreement. The Commission has previously recognized that a range of factors, such as the distributor's geographic footprint, its willingness and ability to offer secondary benefits to the programmer, and the nature of the service purchased can play a significant role in assessing the issue of whether two entities are similarly situated. The Commission should decline to adopt a rote formula that a buying group is automatically

deemed to be similarly situated with an MVPD simply because it has a comparable number of subscribers as the MVPD.

Finally, there is simply no reason to require programmers to provide standardized rate schedules to buying groups. Because so many factors contribute to how the rates in a programming agreement are formulated, articulating a standard rate card is practically impossible – there are simply too many unknowns that would have to be accounted for in such a schedule. Yet the one factor that ACA claims is the greatest unknown, thus driving the alleged need for a rate card – the number of subscribers offered by the buying group – is in fact the easiest input to predict. Because NCTC and its members have enjoyed long-standing relationships with numerous programmers,[2/] including AMC, the past participation of NCTC members in a particular programming agreement can easily serve as a reasonably reliable indicator of future participation in a new agreement with the programmer. ACA's concern that a buying group member might decline to opt in to an agreement because it believes the fees are too high, yet would opt in if they had a rate card and realized that its participation would lead to lower fees, is rather far-fetched. There is, however, a very real risk that standardized rate cards will lead to diminished competitive pricing and consumer harm.

I. THE COMMISSION MUST CONTINUE TO REQUIRE BUYING GROUPS TO ASSUME FINANCIAL LIABILITY FOR MEMBERS

Cable-affiliated programmers should not be forced to deal with a buying group that will not guarantee the financial liabilities of its members. Under the existing rule, a qualified buying group must assume a level of financial responsibility for its members in order to have the right to

[2/] *See* http://www.nctconline.org/public/about.asp ("NCTC has agreements in place with hundreds of cable networks, hardware companies plus access to discounted services, including billing, training and marketing.").

demand that cable operators deal with the group, and the right to bring program access complaints for allegedly discriminatory behavior.[3/]

ACA's argument that an entity should qualify as a "buying group" if it assumes liability only for forwarding all payments due and received from its members for payment under a master agreement to the appropriate programmer should be rejected.[4/] This altered definition would permit an entity that acts as merely a correspondence forwarding agent between MVPDs and programmers to avail itself of the program access rules. ACA's proposed definition would effectively eliminate all financial liability on the part of the buying group – a result that the Commission has previously recognized as unfair to programmers.

The Commission adopted the current liability options to address concerns about the creditworthiness and financial stability of buying groups and to protect programmers from excessive financial risk.[5/] There is no doubt that eliminating the existing liability requirement would subject programmers to greater financial risk when contracting with a buying group than they would be when contracting with an individual MVPD. ACA's assertion that programmers will not be harmed by the rule change because they may still seek legal remedies against individual delinquent buying group members[6/] misses the point of the necessary give-and-take that exists between programmers and buying groups. The Commission has recognized that "to benefit from treatment as a single entity for purposes of subscriber volume, a buying group

---

[3/] A buying group must agree "to be financially liable for any fees due pursuant to a satellite cable programming, satellite broadcast programming, or terrestrial cable programming contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agrees to joint and several liability." If a buying group does not wish to assume full or joint and several liability for its members, it may still qualify by maintaining liquid cash or credit reserves equal to the cost of one month of programming fees for all buying group members, while each member of the buying group remains liable for its pro rata share. 47 C.F.R. § 76.1000(c)(1); *see Further Notice* ¶ 84.

[4/] *Id.* ¶ 86.

[5/] *Id.* ¶ 87.

[6/] ACA Comments at 25.

should offer vendors similar advantages or benefits as a single purchaser, including for example, some assurance of satisfactory financial and technical performance."[7/] In 1998, the Commission rejected a proposal to lessen these liability requirements, on the grounds that doing so would unfairly increase the financial risk to programmers:

> The reason smaller MVPDs enter buying groups is to obtain programming at a discount resulting from the group's aggregate purchasing power. In return for this discount, programming providers are entitled to protection that dealing with such groups will not be exposed to excessive financial risk or excessive expense such as having to routinely collect delinquent programming fees from individual members.[8/]

The risks and loss of benefits the Commission identified in 1993 and 1998 still exist today. The primary benefit of dealing with a buying group is lost if the programmer is forced to pursue every delinquent MVPD on an individual basis. In eliminating the financial obligations of the buying group, ACA's proposal shifts all of the financial risk onto the cable-affiliated programmer, who no longer has the option to decline to enter into an agreement with the group.[9/] ACA's proposal would simply afford NCTC all of the benefits associated with being a buying group while shielding it from – and shifting to programmers – the associated burdens and costs. It would be particularly inequitable to compel cable-affiliated programmers to deal with such an entity, while their unaffiliated programmer competitors remain free to insist upon firmer financial guarantees as a condition of doing business.

7/ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and* Carriage, First Report and Order, 8 FCC Rcd 3359, ¶ 114 (1993) ("*1993 Program Access Order*").

8/ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage1998*, Report and Order, 13 FCC Rcd 15822 ¶ 76 (1998) ("*1998 Program Access Order*").

9/ This financial risk would be compounded even further if the Commission adopts the ill-advised proposal to require programmers to allow all distributors to opt into a programmer agreement, with no ability on the part of a programmer to veto any distributor that it knows to be a delinquent business partner.

Moreover, ACA's proposal seeks to solve a "problem" that does not exist. Even ACA does not argue that the existing rule is overly burdensome or that existing market conditions prevent buying groups from electing one of the three available options. Nor does it provide evidence that buying groups have been systematically discriminated against as a result of the existing liability requirements. Indeed, ACA's posited problem -- that NCTC has *chosen* not to take on its members' liabilities and so cannot bring a program access complaint on their behalf – is already addressed by existing rules, which have served their purpose as intended and in no way prevented any entity from taking advantage of the program access rules. If NCTC wishes to, it may avail itself of the program access rules at any time by satisfying the liability requirements of Section 76.1000(c)(1) – as may any individual MVPD at any time it believes its rights have been violated.[10/] The fact that NCTC chooses to protect itself by acting as no more than "an intermediary or billing and collection interface between the programmer and the member company,"[11/] does not mean that the rules require amendment.

II. ANY RESTRICTIONS ON A PROGRAMMER'S ABILITY TO SAY "YES" OR "NO" TO INDIVIDUAL MVPDS IN A BUYING GROUP WILL HARM COMPETITION

Forcing cable-affiliated programmers to grant particular members of a buying group a government-guaranteed right to opt-in to a master group agreement[12/] will cause significant disruption to the marketplace, harm competition, and interfere with programmers' First Amendment rights. ACA's argument that allowing a programmer to exclude any buying group member from a master agreement renders the requirement that cable-affiliated programmers

---

10/ 47 C.F.R § 76.1000(c)(1).

11/ ACA Comments at 23.

12/ *Further Notice* ¶ 91.

negotiate non-discriminatory agreements with buying groups meaningless[13/] ignores the reality of the marketplace for video programming.

First, cable-affiliated programmers have legitimate pro-competitive reasons for seeking to enter into an individualized, bilateral license agreement with an MVPD. Program carriage agreements are not one-size-fits-all, and there are many terms and provisions that will vary according to an MVPD's individual circumstances. Local market, types of packages offered, the penetration rates of those packages, opportunities to launch new products, other video offerings (*e.g.*, VOD, HD, new media offerings), promotional and marketing opportunities, the success or popularity of the programming on the particular system, other networks served, and numerous other factors all affect the terms and conditions ultimately agreed to in any given deal, and the value that a programmer receives from a particular MVPD can come in many forms. What may be acceptable, nondiscriminatory terms for one MVPD cannot be blindly assumed to be appropriate for *any* MVPD.

If an MVPD is permitted to opt into a buying group's master agreement, regardless of that MVPD's individual circumstances, the terms of that master agreement necessarily become the *de facto* starting point for all individual negotiations. MVPDs will have all the leverage in those negotiations because they face no threat of being deprived of the programming: any MVPD that cannot secure what it perceives to be a better deal than that given to a buying group may simply fall back on the master agreement in order to avoid a programming disruption.

This is especially problematic in cases where a buying group's existing deal does not reflect current marketplace realities. For example, a new and unknown programmer may agree to significantly reduced rates in order to secure broad distribution with a buying group in the

---

13/ *Id.*

hopes of gaining recognition and popularity. If the network is successful in adding value to a distributor's channel lineup, the programmer will be in a position to demand higher licensing fees in future deals with other MVPDs. If the programmer cannot restrict MVPDs' access to an outdated master agreement, every MVPD would be permitted to join the buying group once its current agreement expires in order to opt into an older deal that no longer reflects the programming's true market value. To avoid this result, affected programmers will be hesitant to enter into long-term deals with the group, leading to frequent negotiations for short-term deals and a higher risk of consumer disruption – destroying the very efficiencies that buying groups seek to provide their members.

Second, this process will inevitably lead to the consolidation of market power among just a few large purchasing groups. If any MVPD is permitted to opt into a master agreement, buying group membership will swell as even the largest MVPDs will seek to join. Indeed, ACA's proposed three million subscriber safe harbor threshold[14/] includes many of the nation's largest MVPDs. This will be especially harmful to consumers and could raise serious antitrust concerns, as a negotiating standoff with a buying group could lead to widespread programming disruptions across multiple MVPDs that could represent a significant percentage of the programmer's subscribers nationally or in key markets.[15/] If a significant number of MVPDs in a particular market area are represented by that buying group, viewers will have little or no alternative means of obtaining their desired programming.

14/ *Further Notice* ¶ 94.

15/ Indeed, a key premise behind the Department of Justice's approval of NCTC's approach to negotiating for its members was that "all NCTC's members together serve . . . only about 15.8% of the nation's MVPD subscribers" and so even if all its members participated in a particular agreement, the percentage of purchases in the relevant market would not be sufficient to raise antitrust concerns – a conclusion that DOJ specifically noted would not necessarily hold if a major cable or DBS operator joined NCTC. *See* Department of Justice, Antitrust Division, Letter Response to Business Review Letter Request By The National Cable Television Cooperative, Inc. (Oct. 17, 2003) at 3, 5.

Third, this proposal will have a particularly pernicious effect on competition in the programming marketplace. Forced to grant any MVPD a default right to opt-in into a buying group agreement, cable-affiliated programmers would be faced with a shrinking base of licensing entities and effectively relegated to a monopsony marketplace. Meanwhile, unaffiliated programmers would continue to reap the benefits and rewards attendant to competing in a marketplace with a broader range of purchasing entities, and without any constraints on their ability to insist upon an individual license agreement with certain key MVPDs. ACA in effect is asking the Commission to craft a regulation specifically designed to put only a very small group of programming networks at significant competitive disadvantage, solely to allow NCTC to enjoy all the benefits but assume none of the responsibilities of a buying group.

Fourth, all of these consequences would be made worse if the Commission adopts ACA's proposal to allow a buying group to forego liability for its members' financial obligations. In that situation, the financial risks to the programmer would be compounded. as the buying group would have no incentive to police its own members' creditworthiness. Cable-affiliated programmers would be forced to provide content to MVPDs with questionable financial stability, with no guarantee that their financial obligations will be met.

Finally, forcing cable programmers to speak through mediums not of their choosing would contravene the First Amendment rights of cable-affiliated programmers.[16/] As a First Amendment speaker, AMC has the right to present its speech in the environment and context it chooses, yet ACA's proposal would require AMC to speak in a way that undermines its own

---

16/ Cable programmers "engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994), *citing Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

business strategy and to distribute its content to the public in a manner not of its choosing.[17/] As "[m]andating speech that a speaker would not otherwise make" is "content-based,"[18/] under the strict scrutiny test applicable to such restrictions, the Commission would be required to demonstrate that the burden on speech serves a compelling governmental interest and is narrowly tailored to achieve that end.[19/] ACA's proposal – that the Commission change the rules to accommodate NCTC's efforts to enjoy the benefits of the buying group rules without assuming any of their obligations – does not come close to meeting that standard.

III. A BUYING GROUP SHOULD NOT BE PRESUMED TO BE SIMILARLY SITUATED TO AN INDIVIDUAL MVPD OFFERING A COMPARABLE NUMBER OF SUBSCRIBERS

The *Further Notice's* proposed "clarification" of the standard for what it means for a buying group to be "similarly situated" to an individual MVPD ignores the many other factors that the Commission has already decided are key to determining whether real discrimination has taken place. ACA urges the Commission to use the number of subscribers offered by a buying group and a comparative MVPD as the sole determining factor in analyzing whether the two entities are similarly situated.[20/] This proposal oversimplifies the discrimination analysis and ignores the many legitimate considerations that go into a carriage agreement.

The Commission has repeatedly made clear that there are many factors that go into the assessment of similarity other than the number of subscribers. Factors such as the geographic region in which an MVPD operates, whether the services purchased and offered are similar, and

---

17/ *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 18 (1986) (noting First Amendment implications of "forcing appellant to speak where it would prefer to remain silent").

18/ *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988).

19/ *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

20/ *Further Notice* ¶ 96.

whether the relevant MVPDs have the same ability to offer various benefits and services to the programmer all play a role in a programmer's analysis of the value of a particular agreement.[21/] As the Commission has recognized, "while a vendor may sell the same satellite service to various distributors, both the statute and the record recognize that the prices, terms and conditions of the contracts will reflect the particular attributes of the distributor and its willingness to provide certain secondary services in return for receiving the programming service,"[22/] and that programming agreements often contain "specific terms related to the distinct attributes of the purchasers or secondary transactions involved in the program sale itself."[23/] The Commission also has emphasized that, for purposes of program access proceedings, the proper entity to compare with a buying group can depend on whether that group is involved in a national or local market.[24/] Each of these important distinctions, which play a significant role in determining whether real discrimination has occurred, would be lost were the Commission to simply adopt a rote formula that a buying group is automatically similarly-situated to an MVPD with a comparable number of subscribers.

IV. THERE IS NO REASON TO REQUIRE PROGRAMMERS TO PROVIDE STANDARDIZED RATE SCHEDULES TO BUYING GROUPS

ACA's proposal to require programmers to provide buying groups a "non-discriminatory

---

21/ *Further Notice* ¶ 95 ("The Commission's rules provide that the analysis of whether an alternative MVPD is properly comparable to the complainant includes consideration of, but is not limited to, the following factors: (i) whether the alternative MVPD operates within a geographic region proximate to the complainant; (ii) whether the alternative MVPD has roughly the same number of subscribers as the complainant; and (iii) whether the alternative MVPD purchases a similar service as the complainant. Moreover, the Commission's rules provide that the alternative MVPD "must use the same distribution technology as the 'competing' distributor with whom the complainant seeks to compare itself.") (internal citations omitted). *See also 1993 Program Access Order* ¶ 98.

22/ *Id.*

23/ *Id.* ¶ 127, n.224.

24/ *Id.* ¶ 96, n.158.

schedule of prices based on the number of subscribers that members of the buying group could provide if they chose to opt into the master agreement"[25/] is an unnecessarily complicated "solution" to a problem that does not exist. ACA argues that because NCTC negotiates a deal with a programmer before its members decide whether or not to opt into the deal, neither party knows the precise number of subscribers that NCTC will provide.[26/] ACA worries that this might create a "chicken and egg" problem wherein certain buying group members decline to opt in to the agreement because the fees are too high, even though the license fees would go down if more members decided to opt in.[27/] This "chicken and egg" problem is not real however, and even if it were, ACA's proposed solution adds unnecessary complexity to the negotiation process.

It would be extremely difficult and unfair to ask cable-affiliated programmers to try to create a standard rate card that addressed all possible agreement scenarios and allows distributors to simply opt-in to a particular rate. There are too many variables that go into a programming agreement to reasonably attempt such an exercise – as discussed above, number of subscribers is just one factor among the numerous factors that contribute to the rates, terms and conditions of any particular arrangement. The geographic region in which an MVPD operates, the services purchased, the types of packages offered, the penetration rates of those packages, opportunities to launch new products, other video offerings (*e.g.*, VOD, HD, new media offerings, etc.), promotional and marketing opportunities, and the success or popularity of the programming in the particular local market or on the particular system (to name just a few) may all play a role in determining the ultimate value of carriage on an particular system. It would simply be

---

25/ *Further Notice* ¶ 99.

26/ *Id.*

27/ *Id.*

unreasonable to force a cable-affiliated programmer to produce a "standard" list of rates when no such standard exists or can be easily created.

Further, of all the practical unknowns used to determine carriage rates, the number of subscribers that will participate in the agreement is perhaps the easiest input for buying group members to predict. NCTC and its members enjoy long-standing relationships with numerous programmers, including AMC's networks, and past participation in master agreements for particular programming has been, and continues to be, a reliable indicator of which buying group members are likely to opt into future agreements. Attempting to address all possible eventualities by tying rates to the one factor that is easiest to predict is unnecessary and unwarranted.

Moreover, requiring standardized rate cards based on possible subscribership is likely to have a profoundly negative effect on competition. The Commission has previously rejected similar calls to require programmers to provide standard rate cards, noting that such a requirement "would impose an excessive constraint on vendors – thus increasing the possibility of limiting the sale of programming – and could diminish competitive pricing for multichannel programming through a standardization of higher programming rates as vendors become more aware of the pricing practices by competitors."[28/] This same rationale supports rejecting ACA's proposal today.

28/ *1994 Program Access Order* ¶ 186.

CONCLUSION

For the reasons described above, the Commission should reject the proposed modifications to the program access rules relating to buying groups described in the *Further Notice*.

Respectfully submitted,

/s/ Tara M. Corvo
Tara M. Corvo
Mary C. Lovejoy
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

December 14, 2012